

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JAY LYNN PEMBER,
Petitioner.

No. 2 CA-CR 2015-0464-PR
Filed January 26, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2005012445001DT
The Honorable David B. Gass, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin, Deputy County Attorney, Phoenix
Counsel for Respondent

Jay Pember, Florence
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

ECKERSTROM, Chief Judge:

¶1 Jay Pember seeks review of the trial court's order summarily dismissing his successive and untimely petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Pember has not met his burden of demonstrating such abuse here.

¶2 Pember was convicted after a jury trial of two counts of aggravated assault and one count each of burglary and assault by a prisoner with intent to incite or participate in a riot. He was sentenced to concurrent prison terms, the longest of which was twelve years. We affirmed his convictions on appeal, as well as his sentences as corrected. *State v. Pember*, No. 1 CA-CR 06-0802 (memorandum decision filed Nov. 25, 2008). Before this proceeding, Pember sought post-conviction relief on two occasions and was denied relief; this court declined review in both previous proceedings in 2011.

¶3 In 2012, Pember filed a notice of post-conviction relief, followed by a petition raising various claims, including: (1) that his counsel at trial, on appeal, and in post-conviction proceedings had been ineffective; (2) there was newly discovered evidence; (3) his due process rights had been violated because his competency was not established before trial, he did not raise an insanity defense, and evidence of his mental illness was not presented in mitigation; (4) there had been deficiencies in the grand jury and jury composition; (5) the trial court lacked jurisdiction; (6) his prison term should not have been a flat-time sentence; (7) his right to self-representation had been violated; (8) he is actually innocent; and (9) his convictions

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constitute a miscarriage of justice. The trial court summarily denied relief, finding the majority of Pember's claims could not be raised in an untimely petition and concluding he had not adequately supported his claims of newly discovered evidence and actual innocence. This petition for review followed.

¶4 On review, Pember lists his claims and argues, as he did below, that his claims are not subject to "procedural default" and thus can properly be raised in this untimely proceeding. Pember's argument, however, depends in large part on federal habeas law. Federal habeas law regarding circumstances that might excuse a prisoner's procedural default in state court has no relevance to a state court's determination that a Rule 32 petitioner is precluded, under applicable state law, from raising a claim in an untimely, successive petition. *Cf. Martinez v. Ryan*, ___ U.S. ___, ___, 132 S. Ct. 1309, 1316 (2012); *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 5-6, 307 P.3d 1013, 1014 (App. 2013) (Supreme Court's decision affording "equitable" cause for relief from state court procedural default of federal habeas claim did not alter established Arizona law regarding claims allowable under Rule 32).

¶5 Pember also asserts he may raise his claims because he did not expressly waive them, citing *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). But Pember's most-recent notice was patently untimely, *see* Ariz. R. Crim. P. 32.4(a), and thus *Stewart* does not apply; the time limits of Rule 32.4(a) are not grounded in waiver, *State v. Lopez*, 234 Ariz. 513, ¶¶ 8-9, 323 P.3d 1164, 1166 (App. 2014). And, although Pember is correct that subject-matter jurisdiction cannot be waived, *see State v. Jackson*, 208 Ariz. 56, ¶ 21, 90 P.3d 793, 799 (App. 2004), jurisdictional claims cannot be raised in an untimely proceeding, *see* Ariz. R. Crim. P. 32.1(b), 32.4(a).

¶6 We agree with the trial court that the majority of Pember's claims cannot be raised in this untimely proceeding. *See* Ariz. R. Crim. P. 32.1, 32.4. And Pember has identified no error in the court's summary rejection of his claims of actual innocence and newly discovered evidence. *See* Ariz. R. Crim. P. 32.9(c). The court addressed these claims in a manner permitting review by this court, and its resolution of those claims is correct. Therefore, because no

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purpose would be served in rehashing the court's reasoning here, we adopt its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶7 We grant review but deny relief.